In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1641

GEOFFREY MICHAEL AVERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issue presented is whether in the circumstances of this case petitioner's failure to present his claim for conscientious objector classification to his local board precludes him from challenging the validity of his induction order in a prosecution for failing to report for induction.

Following a non-jury trial before the United States District Court for the Middle District of Florida, petitioner was convicted of willfully refusing to report for induction, in violation of 50 U.S.C. App. 462(a). He was sentenced to six months' imprisonment, followed by a suspended sentence of two years conditioned upon the satisfactory performance of alternative civilian work. The court of appeals affirmed in a *per curiam* opinion (Pet. App. A1-A2).

The relevant facts are set forth in the district court's findings of fact and conclusions of law (Pet. App. A6-A8). Petitioner registered with local Board No. 30, St. Petersburg, Florida, upon reaching his eighteenth birthday in 1968. Following registration, he returned a Classification Questionnaire to his local board (SSS Form 100), in which he indicated that he was a full time college student. He did not respond to a series of questions which would have indicated to the local board that he considered himself a conscientious objector and that he wished to be provided with the appropriate form (SSS Form 150) by which he might apply for exemption.

On September 24, 1968, he was classified II-S. He held this classification until December 9, 1969, when, following his withdrawal from Duke University and in the absence of any information on file or any request for alternative classification, the board reclassified him I-A, available for induction. Petitioner was ordered to report for induction on May 6, 1970. The present indictment and conviction followed petitioner's failure so to report.

Petitioner here challenges his conviction on the ground that he was improperly denied classification as a conscientious objector. Although he never applied for such classification and never sought assistance in applying therefor, he alleged in the courts below that the "Classification Questionnaire" (SSS Form 100) contained misleading information regarding his right to present to his local board a claim for classification as a conscientious objector. The form made provision for a registrant to assert such claim by reasons of his "religious training and belief," the exact language employed in the Selective Service Act (50 U.S.C. App. 456(j)).

Petitioner claimed that his conscientious objection to war was not based on religious grounds but on moral and ethical considerations. Accordingly, he argued that his failure to present his claim to the local board was due to the erroneous information given him and should not preclude a challenge to the validity of the induction order. The claim that the information was misleading is based on the construction of 50 U.S.C. 456(j) in *Welsh* v. *United States*, 398 U.S. 333, decided *after* petitioner failed to report for induction.[1] Petitioner alleged that under *Welsh* he would be entitled to classification as a conscientious objector.

The district court and the court of appeals, relying on *United States* v. *Taylor*, 448 F. 2d 349 (C.A. 5), certiorari denied, 404 U.S. 1024 rejected petitioner's claim. In *Taylor*, the court of appeals, rejecting a claim similar to that raised by petitioner below, wrote (Pet. App. A14, A13):

> Under the facts and in the circumstances of this case, we are convinced that Taylor acted unreasonably. Taylor testified that he interpreted the language of the form to mean that some formal or conventional religious basis was required for a conscientious objector classification, yet he made no real effort to ascertain the actual requirements for the classification despite the ready availability of information and advice at the local board. * * * [W]e take judicial notice of the fact that a registrant's Notice of Classification, which is required to be in his personal possession at all times, plainly advises

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[1] Petitioner first asserted his claim in a motion to dismiss the indictment two years after his refusal to report for induction and a year after indictment (Pet. App. A8).

registrants in capital letters—"For Information and Advice, Go To Any Local Board." Other provisions advise registrants of the availability of Government Appeal, of board members ready "to advise and assist registrants in the preparation of questionnaires and other selective service forms," and of the "positive information policy" of the Selective Service Board.

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* * * It is true that SSS Form 150 does not mention or suggest the very broad construction of the requirements for conscientious objector religious requirements as interpreted by the Supreme Court in *United States* v. *Welch*, and *United States* v. *Seeger*. In this regard it could be argued that the old Form 150 possibly did leave some questions unanswered. Nevertheless, the evidence in this case in undisputed that appellant acting unilaterally decided on uncounselled, subjective information that he could not qualify. Although cases exist where misleading government activity or information constitutes a good defense to a criminal charge, more is required than a bald assertion that the defendant was as a subjective matter misled, and that his subsequent action resulted from his mistaken belief. [footnotes omitted].

This holding, we submit, is correct. There can be no serious claim that the local board—in using language employed by Congress in defining a person eligible for conscientious objector classification—intentionally misled petitioner, particularly where petitioner never sought any guidance as to applicable standards. As the Court of Appeals for the First Circuit held in *United States* v. *Powers*, 413 F. 2d 834, 837: "Were unilateral, subjective, uncounselled misunderstanding of Selective

Service requirements and definitions to be a defense to prosecution, an already laboring vehicle would in all likelihood be completely immobilized." See also *United States* v. *Yoha*, 445 F. 2d 816 (C.A. 9).

This principle is clearly applicable to petitioner here, since he does not and cannot dispute the finding of the district court that he "made a unilateral determination without consultation with anyone that he did not qualify for I-O status under pre-*Welsh* standards" (Pet. App. A7-A8).

On facts not materially different from those here, however, the Court of Appeals for the First Circuit held that the failure of a registrant to present his claim for conscientious objector classification to his local board prior to *Welsh* did not bar him from challenging the validity of the classification. *United States* v. *Fargnoli*, 458 F. 2d 1237 (C.A. 1) (Pet. App. A28-A34). The court of appeals there held that *Welsh* v. *United States*, *supra*, should be applied retroactively, and that the failure of the registrant to make a claim which would surely have been rejected should not preclude the registrant from challenging the validity of the order (Pet. App. A32-A33):

> In our view, the issue must turn on the clarity of the rejected interpretation and the extent of the change wrought by its replacement. Under the Selective Service policies sketched above, we think it manifest that a "non-religious" claim would have been rejected prior to *Welsh* and that for registrants with such beliefs *Welsh* was a dramatic change. Accordingly, we hold that a registrant who can demonstrate that at the time of refusing induction he held beliefs which did not qualify under then-

existing law but do qualify under *Welsh* is not barred from raising that claim by failure to have presented the claim to his local board.

For the reasons stated above, we believe the decision below and the decision in *Taylor* are correct. We recognize that in *Fargnoli*, a factually indistinguishable case, the First Circuit reached the opposite result by pursuing a different and, in our view, erroneous legal theory. Normally, a conflict between circuits might lead us not to oppose the grant of certiorari and we have considered that course in this case. Here, however, the issue can only affect pre-1970 cases and—unlike the situation in *Musser* and *Waldron*, Nos. 72-1733 and 72-6748—we do not believe that a substantial number of persons will be affected if the conflict remains unresolved. Accordingly, we oppose the grant of certiorari.

If the Court should determine to review the case, however, we suggest, given the circumstances, that summary disposition would not be inappropriate. That is not, of course, the Court's normal practice. But, here, with respect to an uncomplicated question, the resolution of which will establish no lasting precedent, plenary consideration with oral argument may not be warranted. For our part, we are content to rest on the opinion in *Taylor*, supplemented by the present memorandum. Petitioner may, of course, file a reply brief if he chooses.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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